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Supreme Court, U.S.
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CASE NO.

in the

Supreme Court of the United States

OCTOBER TERM, 1986

RONALD ARTHUR OFSHE

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

I.

WHETHER PREJUDICE SHOULD BE PRESUMED WHEN THE INVASION OF THE ATTORNEY-CLIENT RELATIONSHIP CONSISTS OF THE GOVERNMENT ITSELF CREATING A CONFLICT BY TURNING A DEFENSE ATTORNEY INTO A GOVERNMENT INFORMANT AGAINST HIS OWN CLIENT AT A TIME WHEN THAT ATTORNEY IS REPRESENTING THE CLIENT IN A PENDING CRIMINAL CASE?

II.

WHETHER IT IS OUTRAGEOUS GOVERNMENT MISCONDUCT WHEN A PROSECUTOR USES A DEFENSE ATTORNEY AS A CONFIDENTIAL INFORMANT AGAINST HIS CLIENT WHILE THAT DEFENSE ATTORNEY IS REPRESENTING THAT CLIENT IN A PENDING CRIMINAL PROSECUTION?

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UNDER THE FACTS OF THIS CASE, THE COURT OF APPEALS MADE AN ERRONEOUS APPLICATION OF LAW IN REQUIRING A DEMONSTRATION OF PREJUDICE BY THE DEFENDANT WHEN HIS COUNSEL IS LADEN WITH CONFLICTS CREATED BY THE GOVERNMENT.

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On Petition For a Writ of Certiorari To The United States Court of Appeals, Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

Petitioner, Ronald Arthur Ofshe, respectfully prays that a writ of certiorari issue to review the judgment, opinion, and order on rehearing of the United States

Court of Appeals for the Eleventh Circuit entered in Case No. 86-5351, on June 1, 1987 and July 9, 1987, which affirmed the judgment of conviction and sentence of the United States District Court of the Southern District of Florida.

OPINION BELOW

The opinion of the United States Court of Appeals, Eleventh Circuit, denying the defendant's direct appeal is reported as *United States v. Ofshe*, 817 F.2d 1508 (11th Cir. 1987). (A. 1).[1] The order of the Magistrate denying the defendant's Motion to Dismiss Indictment for Violations of Due Process and Right to Counsel, as adopted by the trial court, is unreported. That order is reprinted in the Appendix to this Petition. (A. 24-41).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of Rule 17(a) and (c) of the Rules of the Supreme Court and 28 U.S.C. §1254(1). This petition is filed within the authorized time period following the Eleventh Circuit's Order on Rehearing. See Supreme Court Rule 20.1 and 20.4.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

[1]The symbol "A" is used to designate the Appendix to this Petition.

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A Superceding Indictment was filed on March 13, 1985. (R-1-57).[2] A Motion to Dismiss Indictment for Violations of Due Process and Right to Counsel and Memorandum of Law was filed on July 15, 1985. (R-1-76-77).

An evidentiary hearing on the Motion to Dismiss for Violations of Due Process and Right to Counsel was held on October 5, 1985. The Magistrate recommended denial of the Motion to Dismiss in a Review and Recommendation. (R-2-87). The defendant filed a Petition to Set Aside the Magistrate's Review and Recommendation. (R-2-90). The District Judge entered an Order Affirming and Adopting Review and Recommendation, which was filed on December 9, 1985. (R-21-89). The defendant entered a conditional plea on February 11, 1986, reserving the right to appeal the denial of his Motion to Dismiss. (R-2-99). A timely Notice of Appeal was filed on May 19, 1986. (R-2-101).

The facts giving rise to the Motion to Dismiss for Violations of Due Process and Right to Counsel are set

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[2]The record references in this Petition are to the Record on Appeal which was before the Eleventh Circuit and which has been returned to the United States District Court for the Southern District of Florida. This record is available for transmittal to this Court should the Court so order.

forth in some detail in the opinion of the United States Court of Appeals, 817 F.2d 1508 (11th Cir. 1987).

In February, 1983, the defendant, already represented by Florida counsel, retained Marvin Glass as co-counsel. Mr. Glass was, at that time, an attorney practicing in Chicago, Illinois. (SR-1-108). Glass assumed a *lead* counsel position with respect to communications with the prosecution and plea negotiations. (SR-1-108). As noted by the Magistrate, Glass directed the actions of co-counsel as to certain pretrial tactics and strategy, including continuance of trial, waiver of speedy trial, and waiver of indictment. Co-counsel obeyed these directions. (A-29).

Around April 19, 1983, at the same time he was counsel for Ronald Ofshe, Marvin Glass learned that he was the target of a Chicago federal investigation regarding a continuing criminal enterprise. In an effort to avoid indictment altogether, or at least to reduce his own criminal liability, Glass offered to cooperate with the United States Attorney in Chicago in identifying and investigating suspected drug traffickers. (SR-1-47-53). Glass, on or about June 8, 1983, told Assistant United States Attorney Scott Turow and the FBI agents from Chicago that he was currently representing Ofshe in a federal case in Florida, that Ofshe spoke to him about a money-laundering scheme, and that Ofshe had requested Glass to find a buyer for "a ton of marijuana." (SR-1-57-59). The FBI agents from Chicago, acting on instructions from the Chicago United States Attorney, went to Miami, Florida, in June of 1983 and placed a NAGRA body-bug on attorney Marvin Glass and conducted a surreptitious electronic surveillance of the conversation Glass had with his

client Ofshe on June 14, 1983. This conversation included general discussions about an introduction *Glass* wanted to arrange for Ofshe so that Ofshe could purchase marijuana on credit. The conversation also included a brief discussion of the timing and likelihood of success for Ofshe's motion to suppress in the pending Florida federal case. (R-1-76).

This surveillance was conducted without either knowledge or approval of the United States Attorney's Office for the Southern District of Florida. Indeed, the only approval had been secured from the United States Attorney for the Northern District of Illinois. The Government knew that Marvin Glass was acting as Ofshe's attorney at the time of the body recording but decided to undertake the electronic surveillance regardiess.

Attorney Glass was not told at the time of the electronic surveillance that he had to withdraw from the representation of Ofshe. (SR-1-65). Prosecutor Turow acknowledged that he did not tell Mr. Glass to withdraw prior to June 14, the date of the electronic surveillance. (SR-1-65-66). Turow merely considered, but apparently did not communicate to Glass, whether Glass would be permitted to complete the investigation of Ofshe prior to withdrawing from representation of Ofshe. (SR-1-67). Glass told Turow that the pending case was about to be dismissed and later would be refiled. Turow did nothing to verify Glass' statement regarding the dismissal of the case. Indeed, the FBI agent learned from the tape recording of the surveillance that the case was active and pending imminent trial at the very same time that Glass was working as a confidential informant against his client, Ronald Ofshe. (R-1-76; SR-1-66-69).

It was not until August 30, 1983, some two and one-half months later, that the United States Attorney for the Northern District of Illinois instructed confidential informant Glass to withdraw as attorney for the petitioner. (SR-1-70). Only after August 30, 1983, was Glass repeatedly told to withdraw. Only when he still did not withdraw was the United States Attorney for the Southern District of Florida finally informed in November, 1983 of the conflict of counsel in the pending case. (SR-1-70).

In February, 1984, Judge Gonzalez, who was presiding over Ofshe's case, learned that Glass had been enlisted as an informant against his client. That Judge then ordered the United States Attorney to disclose this fact to the defendant. *Glass* appealed Gonzalez' decision, and did not move to withdraw until April, 1984. Even then, he continued to hide the fact that he was working as an informant, with Governmental consent, until February, *1985*. Since the Court file was sealed pending Glass' appeal, defendant Ofshe could not discover the reasons for Glass' withdrawal or even the fact that an appeal taken by Glass. 817 F.2d at 1511. After the disclosure of the actions of the informant/attorney Glass to the defendant in February, 1985, the defendant filed a Motion to Dismiss, which is the subject matter of this Petition.

The Court of Appeals rejected the defendant's contention that the governmental conduct was so outrageous as to require dismissal under the Fifth Amendment. The Court held:

> After considering the totality of the circumstances presented in the case, we hold

> that the actions of the government were not so outrageous as to 'shock the universal sense of justice.' Therefore, the district court's denial of the motion to dismiss is affirmed. In reaching this decision, however, we must stress two points. First, our holding is based upon the unique facts of this case. Second, we do not condone the government's use of criminal defense attorneys as informants against their clients.

In a footnote, the court noted that while they did not find the government's conduct sufficiently outrageous to warrant the dismissal of the Indictment,

> we do believe that Glass' and Turow's conduct was reprehensible. Because the district judge is more familiar with the attorneys' conduct, we assume he will refer this matter this matter to The Attorney Registration and Disciplinary Commission . . . .

The Court of Appeals, in its discussion of the Fifth Amendment issue, emphasized that the conduct of the investigation was designed to obtain information regarding Ofshe's subsequent criminal conduct and not used to *discover* defense strategy in the Florida case. The Court further found that, because Florida *co*-counsel provided zealous representation, Ofshe was not prejudiced in his defense.

Likewise, in rejecting the contention that the indictment should be dismissed because of the invasion of the attorney/client privilege, the Court noted that this Court's opinion in *United States v. Morrison,* 449 U.S.

361 (1981) squarely held that, absent demonstrable prejudice, dismissal was inappropriate as a remedy for such a Sixth Amendment violation. The Court of Appeals found no demonstrable prejudice.

REASONS FOR GRANTING CERTIORARI

IT IS IMPERATIVE THAT THE SANCTION OF DISMISSAL BE PRESCRIBED AS THE REMEDY TO DETER PROSECUTORS FROM CONVERTING DEFENSE ATTORNEYS INTO INFORMANTS AGAINST THEIR OWN CLIENTS. THIS QUESTION SHOULD BE DECIDED BECAUSE IT IS VITAL TO ALL CLIENTS' RELIANCE UPON THE INDEPENDENCE AND LOYALTY OF DEFENSE COUNSEL. THE PAUCITY OF SUPREME COURT DECISIONS DEFINING OUTRAGEOUS GOVERNMENTAL MISCONDUCT LEAVES LOWER COURTS WITHOUT GUIDANCE.

UNDER THE FACTS OF THIS CASE, THE COURT OF APPEALS MADE AN ERRONEOUS APPLICATION OF LAW IN REQUIRING A DEMONSTRATION OF PREJUDICE BY THE DEFENDANT WHEN HIS COUNSEL IS LADEN WITH CONFLICTS CREATED BY THE GOVERNMENT.

1. This Court has not heretofore commented on the limits of acceptable prosecutorial conduct in recruiting a *defense* attorney to be an informant against his own client while the attorney is actively representing the

client in a pending case. Although the court of appeals indicated that it would not "condone" such conduct, it provided no remedy to deter future prosecutors from that conduct. This case is not an isolated incident where prosecutors recruited defense attorneys as informants against their own clients. See *United States v. Harnage*, ____ F.Supp. ____, Case No. 86-Cr-239 (D.Col. June 10 1987). If prosecutors are free to use defense attorneys as informants against their clients, irreparable and fatal damage will be done to the delicate balance between the functions of the defense and the prosecution in making the criminal justice system work. A defendant's attorney has a clearly defined and crucial role in the administration of justice, to-wit: to provide advocacy to the citizen accused in the adversary system of trial. That role is literally destroyed when the defense attorney becomes an agent of the prosecution.

Additionally, such a prosecutorial practice does violence to the trust that the citizens of this country can posit in the attorney/client relationship. Given the magnitude of the shock waves which reach the very foundations of the court system, it is clear that such practice must be deemed outrageous.

2. *Strickland v. Washington*, 466 U.S. 693 (1984), was the landmark case addressing claims of ineffectiveness of counsel. In those general situations, *Strickland* required that the defendant make a preliminary showing of some prejudice. However, the *Strickland* opinion took care to distinguish general ineffectiveness claims of the type it was addressing from the different situations involving claims of ineffective assistance *based on a conflict of interest.* For purposes

of deciding claims of ineffectiveness of counsel, there is a presumption of prejudice when counsel had an actual conflict of interest.

> One type of actual ineffectiveness warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, 446 U.S., at 345-350, 100 S.Ct., at 1716-1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. *In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties.* Moreover, it is difficult to measure *the precise effect on the defense of representation corrupted by conflicting interests.* Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of *presumed* prejudice for conflicts of interest.

Because the effect of attorney disloyalty and lack of zealousness it is difficult to perceive or quantify, this Court has deemed it to be inappropriate to require a defendant to prove actual prejudice in order to be entitled to relief from conflict laden counsel. *Strickland, supra.* For the same reasons, it is inappropriate to apply the broad and general rule of *Morrison*, requiring a demonstration of prejudice by the defendant prior to dismissal for government invasion of the attorney/client relationship. When the government's intentional invasion of the attorney/client relationship results in counsel becoming disloyal to his client, the invasion is

palpably different from government surveillance of attorney/client communications, *viz. Weatherford v. Bursey*, 429 U.S. 545 (1977) or government degrading of an attorney in his client's eye, *viz. Morrison, supra.* Thus, when the government violates a defendant's right to counsel by intentionally and surreptitiously creating a serious conflict between the attorney and client, it creates such a substantial threat of prejudice that prejudice must be presumed. Therefore, the Court of Appeals erroneously applied *Morrison* and erroneously disregarded *Strickland's* reaffirmation of *Cuyler v. Sullivan*, 446 U.S. 335 (1980) in deciding that the defendant was not entitled to dismissal for violation of his Sixth Amendment privilege because there was no demonstrable prejudice.[3] This is a serious error in the legal reasoning in the opinion below. The Court of Appeals glossed over the major issue in the case—it does not matter what prejudice the defendant could prove. The error was fundamental and of far greater import than the incarceration of one defendant. No client should ever have to fear that his own lawyer intends to harm him for that lawyer's own personal gain.

3. The Court of Appeals relied strongly on the absence of demonstrable prejudice to the pending prosecution of defendant Ofshe in rejecting *both* the due process and right to counsel complaints of the petitioner. In its discussion of the Fifth Amendment claim, the Court noted:

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[3]It is important to note that *Strickland* was decided after *Morrison* and *Weatherford*. Thus, *Strickland* demonstrates that the presumption of prejudice for conflict laden counsel survived the *Morrison* ruling.

> Therefore, the invasion of the attorney/client relationship produced no evidence against Ofshe. More importantly, . . . Ofshe *was not prejudiced in his defense.* Had there been demonstrable evidence of prejudice, we would be compelled to reverse. (Emphasis in original.)

817 F.2d at 1516.

In this regard the Court of Appeals committed an error of law in rejecting the outrageous governmental misconduct claim under the Fifth Amendment. This requirement of prejudice as grounds for dismissal on Fifth Amendment due process claims is erroneous since "serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment . . . without regard to prejudice of the accused." *United States v. McCord,* 509 F.2d 334 (D.C. Cir. 1974). See also, *United States v. Crow Dog,* 532 F.2d 1182 (8th Cir. 1976).

> The dismissal of an indictment because of deliberate governmental misconduct is used as a prophylactic tool for discouraging future actions of the same nature. *Elkins v. United States,* 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960) . . .

United States v. Houghton, 554 F.2d 1219 (1st Cir. 1977).

CONCLUSION

This Court is therefore urged to accept this case in order to settle the important question of Federal law regarding the sanctions to be imposed for governmental misconduct in recruiting defense attorneys as confidential informants against their client and to correct the errors of law contained in the opinion of the Court of Appeals.

Respectfully submitted,

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Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ronald Arthur OFSHE,
Defendant-Appellant.

No. 86-5351.

United States Court of Appeals,
Eleventh Circuit.

June 1, 1987.

After denial of a motion to suppress and a motion to dismiss in the United States District Court for the Southern District of Florida, No. 82-6129 CR-JAG, Jose A. Gonzalez, Jr., J., defendant entered a conditional plea of guilty and appealed from the order denying the motion to dismiss and to suppress evidence. The Court of Appeals, Atkins, Senior District Judge, sitting by designation, held that: (1) search warrant was properly issued and executed, notwithstanding that it did not mention informant's criminal record or incarceration, that it was directed to judge who issued warrant, and that it named only one business out of seven located in multiple use commercial buildings; (2) defendant was not prejudiced as to his representation by Government's placing of "body bug" on his attorney and surreptitiously monitoring conversation between attorney and defendant concerning investigation in Illinois, so that dismissal of case was not required; and (3) placing of "body bug" on attorney and surreptitiously

monitoring conversation with defendant was not so outrageous as to violate Fifth Amendment.

Affirmed.

1. Searches and Seizures —112

Insignificant and immaterial misrepresentations or omissions will not invalidate a search warrant. U.S.C.A. Const.Amend. 4.

2. Drugs and Narcotics —188

Omission of informant's six prior convictions and incarceration awaiting trial on charges of conspiracy to traffic methaqualone when purchase of cocaine was made at premises to be searched, when considered with all information contained in search warrant application, did not invalidate warrant; informant had furnished valuable information on at least 14 occasions during prior 12 years and, on each occasion, arrest and/or seizure occurred, and informant stated that he had been in office in question at least once a month for previous three years and that he had observed cocaine in one or both of two safes on each occasion. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures —142

Search warrant can be executed by person to whom warrant is directed or by any officer authorized by law to execute search warrants. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures —127

That search warrant was directed to United States District Judge who issued warrant, and that warrant commanded judge to search premises, was mere technicality and did not require invalidation of warrant. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures —126

That warrant for search named only one business located in multiple use commercial building, which contained seven offices, did not require that warrant be voided; of seven offices in building, only one office was used by business separate from business listed in warrant, and agents followed exactly authority of warrant in that they searched only the two safes and the premises of the businesses listed in the warrant. U.S.C.A. Const.Amend. 4.

6. Indictment and Information —144.1(1)

Defendant was not prejudiced by Government's placing of "body bug" on his attorney and surreptitiously monitoring conversation between attorney and defendant in connection with Illinois investigation, so that dismissal of case was not required; nothing pertinent to Florida case against defendant was communicated to United States Attorney assigned to case, so that no Sixth Amendment violation occurred, and defendant's second attorney had no conflict of interest and provided effective representation at all times after prosecution was initiated. U.S.C.A. Const.Amend. 6.

7. Indictment and Information —144.1(1)

Defendant must be prejudiced before indictment may be dismissed for violation of attorney-client privilege. U.S.C.A. Const.Amend. 6.

8. Constitutional Law —257.5

To constitute constitutional violation, law enforcement technique must be so outrageous that it is fundamentally unfair and shocking to universal sense of justice mandated by due process clause of Fifth Amendment. U.S.C.A. Const.Amend. 5.

9. Constitutional Law —257.5

Government's conduct in invading communications between defendant and defendant's first attorney by placing "body bug" on attorney and surreptitiously monitoring conversation between defendant and his attorney regarding Illinois investigation was not so outrageous that it violated defendant's Fifth Amendment due process rights; no evidence was provided to Assistant United States Attorney prosecuting defendant in Florida action, and defendant's second attorney provided zealous representation so that defendant was not prejudiced in his defense; however, conduct of defendant's first attorney and United States Assistant Attorney was reprehensible. U.S.C.A. Const.Amend. 5.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS*, Senior District Judge.

ATKINS, Senior District Judge:

After entering a conditional plea of guilty, Ofshe appealed from an order denying his motion to dismiss the Indictment and an order denying his motion to suppress evidence. We find that (a) appellant's constitutional rights were not violated by the government's misconduct, and (b) the motion to suppress was properly denied. Thus, we AFFIRM.

I. STATEMENT OF FACTS

On or about December 2, 1982, Agent Sternaman, Drug Enforcement Administration (DEA), applied to the Honorable Norman Roettger for a warrant to search the premises at 2216 S.W. 60th Terrace, Miramar, Florida.[1] Upon review, Judge Norman C. Roettger issued the warrant; unfortunately, it was also directed "To Honorable Norman C. Roettger, United States District Judge," and commanded him to search the premises within 7 days. On December 3, 1982, federal agents

*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation

[1]After the warrant was issued, the agents learned that the premises were subdivided into separate offices containing unrelated businesses. However, all seven of the rooms shared a common entrance, a common receptionist, and a central mail delivery. Only one room was used by a tenant other than Fed-Aire or Appliance King. Moreover, the telephone in Ofshe's office was subscribed to by Fed-Aire of Florida, the business described in the search warrant.

executed a search based upon this warrant at 2216 S.W. 60th Terrace, Miramar, Florida, and found four and one-half pounds of cocaine in a safe located in appellant's office. Along with the cocaine, the agents found other drugs and certain documents which detailed appellant's drug trafficking. In addition, the agents found other evidence, outside the safe, throughout the office.

Agent Sternaman had no direct knowledge or information regarding any illegal activities on the premises. Instead, he relied upon information supplied to him by another agent, Special Agent Thomas L. Chapman, who worked for the North Carolina Office Bureau of Alcohol, Tobacco & Firearms (ATF). Like Sternaman, Agent Chapman had no direct knowledge of any illegal activities. Rather, this agent obtained information from an unnamed informant who informed Chapman that he had obtained an unspecified amount of cocaine from an unspecified person in an unspecified manner from an office inside the premises on an unspecified date.

Agent Sternamen's application for a search warrant failed to inform Judge Roettger that the confidential informant had six prior convictions and was incarcerated and awaiting trial on charges of conspiracy to traffic methaqualone. The government later disclosed the identity of the confidential informant, Junior Gambill, when he was to be utilized as a witness. This disclosure included a recitation of his prior felony convictions.

In December, 1982, appellant Ofshe was arrested in Miramar, Florida, for possession with intent to distribute cocaine. He retained the services of Mel

Black, Esquire, who handled the bond hearing, arraignment, initial discovery review and the preparation of a motion to suppress. Mr. Black still represents Ofshe.

In February, 1983, Ofshe retained Marvin Glass, Esquire, to act as co-counsel, and informed Black of his decision. Glass indicated that he would handle all communications with the government, including plea negotiations, and that Black would prepare the case for trial, and would investigate and file appropriate motions. This breakdown of duties was confirmed in a meeting between Black and Glass in March, although Black remained sole counsel of record until July 1, 1983.

Thereafter, while still acting as counsel for Ofshe, Glass contacted the United States Attorney's Office in Chicago, Illinois, and learned he was a target of the "Greylord"[2] investigation. Being keen to diminish his own criminal responsibility, Glass offered to provide information to and cooperate with the government in identifying and investigating suspected drug traffickers. Therefore, Glass periodically met with Assistant U.S. Attorney (AUSA) Turow to provide useful information about certain alleged criminal activities.

Later, on June 8, 1983, Glass mentioned Ofshe as a possible target during a meeting with Turow. When Glass indicated that he was currently representing Ofshe in Fort Lauderdale, Turow warned him not to

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[2]Operation "Greylord" refers to a federal investigation of corruption within the Cook County Circuit Court. *Chicago Courts Reel From Corruption Probe*, The National Law Journal, March 2, 1987, at 1, Col. 1.

reveal any privileged attorney-client conversations but encouraged him to proceed as an informant. Glass then began to detail activities regarding certain individuals, whom he had met through Ofshe, who discussed a money laundering scheme. In addition, Glass told AUSA Turow about Ofshe's request that Glass find a buyer for "a ton of marijuana."

AUSA Turow sought and received permission to place a Nagra body bug on Glass and conduct an electronic surveillance of the conversations between Glass and his client. These conversations included some unplanned discussions about his Florida case including the timing and likelihood of success of the motion to suppress. This electronic surveillance was done with Glass' consent while acting as Ofshe's attorney and as a "cooperating individual" for the government. To guard against improper conduct, AUSA Turow testified that the agents installing and monitoring the body tape were given very strict guidelines to instruct Glass not to violate any attorney-client privilege.[3]

Glass, of course, was not told at the time of the electronic surveillance that he had to withdraw from representation of Ofshe. Indeed, Glass was not told to withdraw for several months. Eventually, however, he was told to withdraw, but the United States Attorney did nothing to confirm his withdrawal or otherwise determine the status of the case. Significantly, the government did not file a motion to disqualify Glass or take any other action to inform the defendant of the

[3]The monitored conversation was conducted without approval of the United States Attorney's Office or the United States District Court in Miami, Florida.

conflict of interest, although it was aware of the conflict since June 8, 1983. Thus, the government allowed the ineffective representation to continue for over 10 months.

In February, 1984, Judge Gonzalez, who was presiding over Ofshe's case, learned that Glass had been enlisted as an informant against his client and ordered the United States Attorney to disclose this fact to the defendant. Glass appealed Gonzalez's decision and did not move to withdraw until April, 1984. Even then he continued to hide the fact that he was working as an informant, with governmental consent, until February, 1985. Since the court file was sealed, defendant Ofshe could not discover the reasons for Glass' withdrawal or about the appeal taken by Glass.

Although Black was prepared for trial in April of 1983, Glass instructed him to file a motion for continuance which was to include a waiver of speedy trial. Later, the day after Glass began giving information to the United States Attorney in Illinois, Glass had Ofshe execute a written formal waiver of speedy trial. At Glass' instructions, additional continuances and waivers of speedy trial were filed in May and June, 1983. Nevertheless, by July, 1983, both sides had announced at calendar call that they were ready for trial.

On June 28, 1983, the parties appeared at court before Judge Gonzalez for the actual trial. On that day, AUSA Hursey advised that he needed a few days to locate his witnesses. Glass and Hursey then left the courtroom and went into a private conference without

the presence of Ofshe or Black. During their private meeting, Glass convinced Hursey to dismiss the Indictment based on Glass' representation that Offshe would cooperate and provide the information. Glass further offered to waive reindictment and allow the government to file charges by Information. Subsequently, Hursey returned to the courtroom and moved for dismissal of the Indictment without prejudice. The motion was granted by the court.

As Glass, Ofshe, Black, and private investigator David Waters were leaving the Courthouse, they discussed various matters which required legal attention since Ofshe's case had been dismissed. Glass stated he would secure all property originally seized or given to secure the personal surety agreement, including an automobile that was in forfeiture. Based on that representation, Black did no further work on the forfeiture proceeding.

Later, the government reinstituted criminal proceedings against Ofshe. In August, 1983, Black received a Notice of Arraignment on an Information and called Glass who told him that would take care of it. Black then prepared a motion to dismiss the Information, but did not file it because Hursey told him that Glass had agreed to waive the filing of an Indictment.

Black testified he next appeared on December 9, 1983 at a sounding of the case for trial. He then spoke to Glass who told Black he would have another attorney appear at court. Neither Glass nor any other attorney appeared. Fortunately, the case was taken off the calendar and continued through February, 1984.

In February, 1984, the defense announced they were ready for trial, however, the case was not set for trial until March, 1985. Ofshe did not request any continuances from January, 1984 until March, 1985. His request for continuance from the March, 1985 trial setting was based upon problems in reassembling the dormant file, locating missing witnesses, discovering and investigating the reasons for Glass' *in camera* appeal from Gonzalez's order, and researching the grounds for the motion to dismiss.

Black first learned, on February 16, 1985, through a letter from Chief Assistant United States Attorney Joseph McSorley that Glass was a government informant and had worn a body bug during his conversations with his client, Ronald Ofshe, on June 14, 1983. Naturally, Black was concerned. Ofshe was also concerned.

AUSA Turow testified in detail about the procedures employed to assure there would be no violation of any attorney-client privilege. He stated that he and his superiors discussed the matter fully as soon as they learned that Ofshe's counsel, Glass, was "keen on diminishing his criminal resonsibility" and wanted to become a "cooperating individual," and was willing to provide information regarding Ofshe's criminal activities. Turow also testified that by June 10, 1983, the United States Attorney in Illinois had given government agents very strict instructions that Glass was to follow based on the attorney-client privilege. The agents were to transmit these guidelines to Glass.

Apparently, as the agents were wiring Glass for his undercover conversation with Ofshe, Glass said that the

case against Ofshe had been dismissed. After June 1983, contact between Glass and the United States Attorney's Office in Illinois was sporadic, but in August of 1983 Glass told the agents that the case had been reinstated and that he still represented the defendant. At this time, Turow felt obliged to inform the United States Attorney in the Southern District of Florida of the situation. However, the United States Attorney for the Southern District of Florida and his chief assistants decided not to reveal these matters to the prosecutor, Hursey.

II. DISCUSSION

Although appellant relies upon several independent theories to challenge his conviction, this appeal generally concerns two. First, was the search warrant properly issued and executed? Second, does the government's use of a criminal defense attorney as an informant warrant the reversal of appellant's conviction?

A. *The Search Warrant*

1. *The Sufficiency of the Application for the Search Warrant*

Ofshe argues that the agents omitted critical information from the search warrant application. Specifically, the application for the search warrant did not mention the criminal record of the informant nor did it state that he was in federal custody when the purchase of cocaine was made at the premises to be searched. Ofshe argues that these omissions were "either intentional or with reckless disregard for the

truth." For these reasons, he urges that doubt is cast on the existence of probable cause, and that the district court should have invalidated the search warrant.

Appellant overlooks the critical fact that the search warrant affidavit was based on the personal observations of a reliable informant. When Agent Chapman communicated the informant's observations to Agent Sternaman, the affiant, Chapman, described the informant as a proven, reliable informant who had furnished valuable information on at least 14 occasions during the past twelve years. On each occasion, an arrest and/or seizure occurred. The informant stated that he had been in the office in question at least once a month for the previous three years and that he had observed cocaine in one or both of the two safes on each occasion. The informant further stated that, sixteen days before (November 16, 1982), he had observed a multi-kilogram quantity of cocaine in a safe located at the address in question and had obtained cocaine from Ofshe for his own use.

[1, 2] Insignificant and immaterial misrepresentations or omissions will not invalidate a warrant. *See Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Before issuing a search warrant, the judge must "make a practical, common sense decision . . ., given all the circumstances set forth in the affidavit . . ., [that] there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1982). The reviewing court must then examine the situation and determine that the issuing judge "had a 'substantial

basis for . . . conclud[ing]' that probable cause existed." *Id.* at 238-39, 103 S.Ct. at 2332-33 (*quoting Jones v. United States,* 362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697 (1960)). Here, it was the past, credible dealings over a twelve year period with Agent Chapman. In addition, the informant's statements were based on his personal knowledge. He recited having received cocaine from Ofshe for his personal use. This fact, combined with this further statement that he had seen cocaine in Ofshe's safes once a month for the previous three years, told the district court enough about the informant's background. Therefore, the omission of the informant's criminal convictions and incarceration, when considered with all the information contained with the application, does not invalidate the warrant. *See United States v. Harrington,* 761 F.2d 1482, 1484-85 (11th Cir.1985); *United States v. Strauss,* 678 F.2d 886, 893 (11th Cir.), *cert. denied,* 459 U.S. 911, 103 S.Ct. 218, 74 L.Ed.2d 173 (1982).

2. *The Failure to Direct the Warrant to a Civil Law Enforcement Official and its Issuance by the Same Person Designated to Execute the Warrant*

Ofshe argues that the search warrant was invalid because it was issued by and directed to the Honorable Norman C. Roettger, United States District Judge, for execution. Ofshe also asserts that the warrant violated the Constitutional requirements of the Fourth and Fifth Amendments because Judge Roettger was not a "neutral and detached magistrate." We disagree.

[3, 4] The designation of the issuing judge to execute the warrant was obviously inadvertent. A search warrant can be executed by the person to whom

a warrant is directed or to any officer authorized by law to execute search warrants. *United States v. Martin,* 600 F.2d 1175, 1181-82 (5th Cir. 1979). Federal agents, including the affiant, DEA Agent Robert Sternaman, executed the warrant. The defect in the search warrant was a mere technicality and does not require this court to invalidate the warrant. *See United States v. Soriano,* 482 F.2d 469, 478-80 (5th Cir.1973), *modified in other respects,* 497 F.2d 147 (1974) *(en banc); see also United States v. Burke,* 517 F.2d 377 (2d Cir.1975). The errors assailed were those of form, not of substance. Thus, the district court was correct in holding that these defects did not invalidate the warrant.

3. *Description of Premises.*

[5] "The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons to be seized.' " *Maryland v. Garrison,* ____ U.S. ____, 107 S.Ct. 1013, 1017, 94 L.Ed.2d 72 (1987). In this case the "premises" which were to be searched were described in the search warrant as:

> Appliance King, Division of Fed-Air of Florida, Inc., located at 2216 S.W. 60th Terrace, Miramar, Florida, a two-story concrete, and masonry building, white in color, and its contents, including two safes, each being four feet by four feet.

Appellant contends that this description was insufficient, and that the district court should have

voided the warrant because it named only one business located in a multiple use commercial building. Again, we disagree.

> An erroneous description of premises to be searched does not necessarily render a warrant invalid. The Fourth Amendment requires only that the search warrant describe the premises in such a way that the searching officer may " 'with reasonable effort ascertain and identify the place intended.' "

United States v. Burke, 784 F.2d 1090, 1092 (11th Cir.1986) (citation omitted).

The district court found that the agents learned only after the warrant was issued that the premises described in the warrant were subdivided into separate offices and the record supports this conclusion. Although the agents had looked at the outside of the building on December 2, 1983, they did not actually enter the building until December 3, 1983, when they executed the warrant. The layout of the office space supports the agents' confusion. Of the seven offices in the building, six were used by Fed-Aire, Appliance King or appellant. Only one office was used by a separate business. When the agents executed the search warrant, they found that there was a single, locked entrance to the premises. The locked door was controlled by a single receptionist, who answered the telephone for all the offices. The mail was also received centrally and distributed to each office. Thus, the agents reasonably believed, until they entered the premises, that the office space belonged solely to Appliance King/Fed-Aire. Moreover, during the search, there appeared to be a connection between Ofshe and

Wayne Steinberg, who identified himself to the agents as the owner of the building.[4]

In the final analysis, the agents followed exactly the authority of the warrant in that they searched only the two safes and the Appliance King Division of Fed-Aire of Florida, Inc. premises. Their actions were reasonable. Thus, we cannot invalid the warrant for the reason presented. *See e.g., Garrison,* 107 S.Ct. at 1019.

B. *The Government's Use of Criminal Defense Counsel as an Informant*

Ofshe asserts that he was prejudiced by the invasion of his attorney-client relationship. He also vehemently argues that the government's conduct in this case was so utterly outrageous that it warrants dismissal of the Indictment. Because of the gravity of this situation, we have carefully examined appellant's serious contentions.

1. *The Invasion of the Attorney-Client Privilege*

Ofshe forcefully argues that his expectation of privacy was violated and his attorney-client privilege was invaded; therefore, he insists that his Indictment should have been dismissed. He argues that he was generally prejudiced because the government encouraged Glass to act in his own interest at the

[4]When the agents entered appellant's office, they found that the safes mentioned in the warrant were locked. The agents called a locksmith to drill open the safes. When the locksmith arrived, he asked Steinberg to save him a lot of work and give the agents the combination to the safes. Steinberg told the locksmith not to talk to him and walked away.

expense of his client, creating an obvious conflict of interest. More specifically, he points out that the government placed a body bug on his attorney and surreptitiously monitored a conversation which included discussion concerning future criminal activity and discussions regarding his pending court case.

Ofshe insists that the infringement of his attorney-client privilege or his right to counsel automatically requires the dismissal of his Indictment. Yet, in *United States v. Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981), the Supreme Court squarely held that absent demonstrable prejudice, dismissal was plainly inappropriate as a remedy for such a Sixth Amendment violation. Here, we find no demonstrable prejudice.

[6] During the recorded conversation, the only information related to the pending case concerned the motion to suppress which was part of this public record. No additional specific facts in the case or strategic decisions were discussed. In fact, Ofshe's verbatim recital in his brief confirms this conclusion. Significantly, nothing pertinent to the Florida case was communicated to the United States Attorney assigned this case. Thus, since no information was furnished AUSA Hursey as a result of the intrusion, no Sixth Amendment violation occurred. *Weatherford v. Bursey*, 429 U.S. 547, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977).

[7] Other cases emphasize the fact that a defendant must be prejudiced before an Indictment may be dismissed. For example, *United States v. Melvin*, 650 F.2d 641 (5th Cir.1981) is instructive. There, the court

reversed a district court order dismissing an Indictment because of a government informant's attendance at meetings between defendant and his counsel at which defense strategy had been discussed. The *Melvin* court held that the district court could not dismiss the Indictment without first finding that the intrusion into appellee's attorney-client relationship had prejudiced the ability of appellee's attorneys to provide adequate representation or otherwise prejudiced his defense. If prejudice was found, the district court was ordered to make a determination as to whether some other remedy short of dismissal could be tailored to vindicate appellee's Sixth Amendment right to counsel and a fair trial.

In *United States v. Sander*, 615 F.2d 215 (5th Cir.), *cert. denied*, 449 U.S. 835, 101 S.Ct. 108, 66 L.Ed.2d 41 (1980), police officers examined an attorney's confidential files on defendant's case following the attorney's murder. No injury or prejudice resulted because nothing in the file was utilized by the prosecution. Therefore, the court in *Sander* held that the appropriate remedy for such an intrusion is to suppress any evidence unlawfully obtained, rather than dismiss the case. *Sander*, 615 F.2d at 219.[5]

We reiterate and emphasize that Ofshe suffered no prejudice as a result of the taped conversation. The taped conversation produced no tainted evidence, and the intrusion into any potentially privileged attorney-client matters was not purposeful. In short, no information was

[5]Here, the issue of suppression is irrelevant as none of the statements recorded was to be used to prove the government's case.

provided to the prosecuting attorney. Similarly, while Ofshe claims that he was also prejudiced by waiving, at Glass' direction, his right to dismissal under the Speedy Trial Act, he overlooks the fact that original and supplemental motions to suppress and other motions were filed in his behalf by Black which tolled the running of the speedy trial clock until they were heard. *See Henderson v. United States*, ___ U.S. ___, 106 S.Ct. 1871, 1874, 90 L.Ed.2d 299 (1986). Likewise, the government stipulated to the testimony of any unavailable defense witnesses. Finally, we note that appellant was not prejudiced in this case because Black had no conflict of interest and provided zealous representation at all times after prosecution was initiated. Regardless of Glass' poor performance, Black was not prevented from acting in Ofshe's best interest. Thus, we hold that the district court properly denied Ofshe's Motion to Dismiss.

2. *Outrageous Government Conduct Claim Under the Fifth Amendment*

[8] Ofshe argues that the government's conduct in invading the communications between him and Glass was so outrageous that it violated his Fifth Amendment due process rights. *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). To constitute a constitutional violation the law enforcement technique must be so outrageous that it is fundamentally unfair and "shocking to the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment." *Russell* at 432, 93 S.Ct. at 1643. In determining whether such conduct exists, the "totality of the circumstances" must be considered "with

no single factor controlling." The defense is to be invoked only "in the rarest and most outrageous of circumstances." *United States v. Haimowitz*, 725 F.2d 1561, 1577 (11th Cir.), *cert. denied*, 469 U.S. 1072, 105 S.Ct. 563, 83 L.Ed.2d 504 (1984), *quoting United States v. Tobias*, 662 F.2d 381, 387 (5th Cir.1981), *cert. denied*, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982). *See also United States v. Mulherin*, 710 F.2d 731, 735 (11th Cir.1983), *cert. denied*, 464 U.S. 964, 104 S.Ct. 402, 78 L.Ed.2d 343 (1984). Moreover, in *Hampton*, the court indicated that . . . a demonstrable level of outrageousness warranting dismissal would be especially difficult to show in contraband offenses "which are so difficult to detect in the absence of undercover government involvement." *Hampton* at 495 n. 7, 96 S.Ct. at 1653 N. 7.

[9] After considering the totality of the circumstances presented in this case, we hold that the actions of the government were not so outrageous as to "shock the universal sense of justice." Therefore, the district court's denial of the motion to dismiss is affirmed. In reaching this decision, however, we must stress two points. First, our holding is based upon the unique facts of this case. Second, we do not condone the government's use of criminal defense attorneys as informants against their clients.[6]

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[6]While we have not found the government's conduct sufficiently outrageous to warrant the dismissal of his Indictment, we do believe that Glass' and Turow's conduct was reprehensible. Because the district judge is more familiar with the attorneys' conduct, we assume he will refer this matter to The Attorney Registration and Disciplinary Commission, 203 N. Wabash, Suite 1900, Chicago, Illinois 60601, for appropriate action.

The facts show that the investigation was initiated by the Chicago office and that no evidence was provided to the Miami Assistant U.S. Attorney prosecuting Ofshe. Glass' offer to help the Chicago office was designed to obtain information regarding Ofshe's subsequent criminal conduct and not used to discover defense strategy in the Florida case. Therefore, the invasion of the attorney-client relationship produced *no evidence against Ofshe.* More importantly, because Black provided zealous representation, Ofshe *was not prejudiced in his defense.* Had there been demonstrable evidence of prejudice, we would be compelled to reverse.[7]

III. CONCLUSION

Several aspects of this case concern us. The evidence against Ofshe should have been easily obtained. Instead, the bungled search warrant procedures created unnecessary difficulties. Furthermore, the conduct and judgment exhibited by some of the attorneys were questionable at best. Yet, the conduct at trial, by Black, Hursey, and Judge Gonzalez, was quite credible and ensured that Ofshe was provided with a fair trial.

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[7] In addition, appellant, argues that he was also prejudiced by "waiver of forfeiture proceedings" and "change in precedents concerning search and seizure." We agree with the magistrate in the Review and Recommendation, affirmed and adopted by the district court:

> The defendant's allegations concerning waiver of forfeiture proceedings and change in precedents relating to search and seizure are without merit. The forfeiture issue is not relevant to this case and a change in precedents is speculative and fails to set forth sufficient reasons to support dismissal.

After reviewing the law and applying it to the unique facts presented in this case, we find that the district court correctly denied the motion to suppress and the motion to dismiss. Therefore, WE AFFIRM.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-6129-Cr-GONZALEZ

UNITED STATES OF AMERICA

vs.

RONALD OFSHE

REVIEW AND RECOMMENDATION

THIS CAUSE is before the Court on Motion to Dismiss filed by the defendant, Ronald Ofshe. At hearing, certain factual issues were resolved by the testimony of former Assistant United States Attorney Michael Hursey; Assistant United States Attorney Scott Turow of the Northern District of Illinois; Federal Bureau of Investigation Special Agent Robert Gibson III; secretary to Mel Black, Gail Allen; private investigator William David Waters and attorney Mel Black.

The record and testimony revealed that in December of 1982, the defendant was arrested in Miramar, Florida, and he retained the services of Mel Black, Esq., who handled the bond hearing, arraignment, initial discovery review and the preparation of a motion to suppress.

The testimony revealed further that in February of 1983, the defendant retained Marvin Glass, Esq., to act as co-counsel. As Mr. Black testified:

> Glass indicated that he was going to handle all communications with the Government, including plea negotiations, and that Mel Black was to continue preparing the case, doing the investigation and working on motions. . . . This breakdown of duties was confirmed in a meeting between Black and Glass in March. . . .

Subsequently, according to the Assistant United States Attorney then assigned the case, Michael Hursey, Esq., Mr. Glass and Mr. Black met with Mr. Hursey to discuss a plea negotiation, and the conversation was directed to alleged defects in the search warrant as opposed to the question of the defendant's cooperation with the Government.

Assistant United States Attorney Scott Turow testified, essentially, that while acting as counsel for the defendant in the instant case, Mr. Glass contacted the United States Attorney's Office in Chicago, Illinois and, being "keen to diminish his own criminal responsibility", Mr. Glass offered to provide information to and cooperate with the Government.

The defendant first was mentioned by Mr. Glass as a possible target on June 8, 1983 when, during a meeting with Assistant United States Attorney Scott Turow, Mr. Glass told Mr. Turow that he represented a defendant in Fort Lauderdale. Mr. Glass then began to detail activities relating to some persons in North Carolina who he had met through the defendant and who spoke to Mr. Glass about a money laundering scheme and of the defendant's request that Mr. Glass find a buyer for "a ton of marijuana."

At this juncture, Mr. Turow sought and received permission to place a Nagra body bug on Mr. Glass and conduct an electronic surveillance of the conversations between Mr. Glass and his client, the defendant, Ronald Ofshe. These conversations included minimal unplanned discussions about his Florida case. This electronic surveillance was done with the consent of Mr. Glass who was acting as Mr. Ofshe's attorney and as a "cooperating individual" for the Government.

Assistant United States Attorney Scott Turow testified that the agents installing and monitoring the body tape were given very strict guidelines to instruct Mr. Glass not to violate any attorney-client privilege. The monitored conversation was conducted without approval of the United States Attorney's Office or the United States District Court in Miami, Florida. However, approval had been obtained from the United States Attorney of the Northern District of Illinois for the electronic surveillance in Miami. As Mr. Black points out in his Supplemental Memorandum in Support of his Motion to Dismiss.

> The body bug recorded the entire conversation regardless of whether the conversation was about the suspected future criminal activity or about the pending case against Ofshe. No precautions were taken to prevent or minimize the surveillance and recording of privileged attorney/client communications about the instant pending case. . . . The Government knew that Marvin Glass was acting as Ofshe's attorney at the time of the body recording but

> decided to proceed regardless. The Agent listened to the tape and learned it contained a strategy discussion of Ofshe's case. Glass was not told at the time of the electronic surveillance that he had to withdraw from representation of Ofshe. Glass was not told to withdraw for several months. Even after he was told to withdraw, the U.S. Attorney did nothing to confirm his withdrawal or to otherwise follow the status of the Ofshe case. The Government did not file a motion to disqualify Glass or take other action to inform the defendant of the conflict of interest. The Government had been aware of the conflict of interest since June 8, 1983, but allowed the ineffective representation to continue for over 10 months. Glass did not move to withdraw until April, 1984 as counsel for Ofshe and even then continued to hide the real reason for withdrawal, with Governmental consent, until February, 1985. The Court file was sealed . . . the Defendant Ofshe could not learn the reasons for withdrawal by Glass or about the appeal taken by Glass to overturn the Court's order to disclose to the Defendant the actions of Glass and the Government.

The testimony from hearing also reveals that although Mr. Black was prepard for trial in April of 1983, Mr. Glass instructed him to file a Motion for Continuance which was to include a waiver of speedy trial. Mr. Glass later had the defendant execute a written formal waiver of speedy trial which was done the day after Mr. Glass began giving information to the United States Attorney in Illinois.

At Mr. Glass' instructions, additional continuances and waivers of speedy trial were filed in May and June, 1983, and by July, 1983, both sides had announced at calendar call that they were ready for hearing on a pre-trial motion and for trial.

On June 28, 1983, the parties appeared at Court before Judge Gonzalez for the actual trial. On that day, Mr. Hursey advised that he needed a few days to get his witnesses. Mr. Glass and Mr. Hursey then left the courtroom and went into a private conference without the presence of the defendant or Mr. Black. Subsequently Mr. Hursey returned to the courtroom and moved for dismissal of the Indictment without prejudice. The motion was granted by the Court.

Mr. Hursey testified at hearing that in the above private meeting Mr. Glass convinced him to dismiss the Indictment and promised that the defendant shortly would be able to provide the information and cooperation that Mr. Glass had promised. Mr. Glass further offered to waive re-indictment and allow the Government to file charges by Information.

According to the witnesses at hearing, as Mr. Glass, the defendant, Mr. Black and private investigator David Waters were leaving the Courthouse, Mr. Glass stated he was going to "take care of" obtaining return of all property seized or given to secure the personal surety agreement, including an automobile that was in forfeiture. Based on that representation, Mr. Black testified he did no further work on the forfeiture.

In August of 1983, Mr. Black received a Notice of Arraignment on an Information and called Mr. Glass who told him that Mr. Glass would take care of the problem. Mr. Black prepared a Motion to Dismiss the Information, but he did not file it when Mr. Hursey told him that Mr. Glass had agreed previously to waive the filing of an Indictment. Thus, it appeared that Mr. Glass was continuing to make the decisions about strategy and tactics in the case.

Mr. Black testified he next appeared on December 9, 1983 at a sounding of the case for trial. He then spoke to Mr. Glass by telephone who told Mr. Black not to worry about the sounding as he would take care of it by having another attorney appear. Neither Mr. Glass nor any other attorney appeared, but the case was taken off the calendar and continued through January, 1983 and February, 1984.

In February of 1984, Mr. Black, now sole trial counsel, announced ready for trial. (Mr. Black had received a motion to withdraw from Mr. Glass in April of 1984.) The case was not set for trial after February, 1984, until March, 1985. The defendant did not request any continuances from January, 1984 until March, 1985. According to the testimony, the request for continuance from the March, 1985 trial setting was owing to problems in re-assembling the dormant file, locating missing witnesses and discovering and investigating the reasons for the *in camera* appeal by Mr. Glass and the grounds for the instant Motion to Dismiss.

Mr. Black first learned, on February 16, 1985, in a letter from Chief Assistant United States Attorney Joseph McSorley that Mr. Glass was a Government informant and had worn a body bug during his conversations with his client, Ronald Ofshe, on June 14, 1983.

Assistant United States Attorney Scott Turow testified in detail about the lengths they went to to assure there would be no violation of any attorney-client privilege. He assured the Court that he and his superiors discussed the matter fully as soon as they learned, in June of 1983, that the Florida defendant, Ronald Ofshe, was a possible target of the Illinois investigation and that Ofshe's counsel, Mr. Glass, was "keen on diminishing his criminal responsibility" and wanted to become a "cooperating individual." Mr. Turow testified that by June 10, 1983, the United States Attorney in Illinois had given Government agents very strict instructions that Mr. Glass was to follow in order to avoid violating any attorney-client privilege, and the agents were to transmit these guidelines to Mr. Glass. Apparently, as the agents were wiring Mr. Glass for his undercover conversation with the defendant, Mr. Glass said that the case against Mr. Ofshe had been dismissed. After June of 1983, contact between Mr. Glass and the United States Attorney's Office in Illinois was sporadic and, in August of 1983, when Mr. Glass told the agents that the case had been reinstated and Mr. Glass still represented the defendant, Mr. Turow felt obliged to tell the United States Attorney in the Southern District of Florida of what had happened. When the information relative to all the events regarding Mr. Glass, Mr. Ofshe and Mr. Glass' cooperation were related, the United

States Attorney for the Southern District of Florida and his chief assistants decided not to reveal these matters to the prosecutor, Mr. Hursey.

In sum, therefore, by August of 1983, Mr. Glass was cooperating with the United States Attorney in Illinois and snitching against his client, Mr. Ofshe, while not telling his co-counsel, Mr. Black, about his conflict or his activities. Mr. Glass did not file a Motion to Withdraw until nearly nine months later—in April of 1984. In the meantime, the right hand of the Government (the Illinois branch) was very busy trying to conduct undercover business in south Florida without letting the left hand of the Government (the South Florida branch) know what it was doing. When the right hand finally had to confront the left hand, they apparently decided to try to wash both hands and wipe the resulting grime on a towel to be put into a sealed hamper that neither the defendant nor the prosecutor nor even the defendant's local counsel could see into.

RECOMMENDATIONS OF LAW

The defendant alleges prejudice owing to gross Government misconduct and, citing to *United States v. Russell*, 411 U.S. 423 (1973), contends that the cumulative effect of the many alleged abuses by the Government mandates that the court impose the ultimate sanction of dismissal. The defendant cites the Court to a catalogue of abuses:

1. Waiver of speedy trial and exclusion of time from April 21, 1983 through February 28, 1985.

2. Deprival of counsel of choice.

3. Governmental informant directing defense case, strategy and tactics.

4. Governmental informant being privy to defense strategy and tactics.

5. Waiver of forfeiture proceedings.

6. Change in the precedents concerning search and seizure.

7. Government overheard attorney/client conversations.

In support of point one, waiver of speedy trial, the defendant asserts that Marvin Glass was responsible for

> directing a waiver of speedy trial and procuring unnecessary continuances. Obviously Glass sought the delays of Ofshe's case so he could keep Ofshe available as a bargaining chip. When Glass directed the continuance of April 21, 1983, May, 1983, and June 21, 1983, he had already assumed the role of government agent, and he was not continuing the case for the benefit of the client but in order to keep the case pending so he could offer Ofshe as a target of investigation.

Thus, the defendant contends, Mr. Glass caused the defendant to waive his right of dismissal for the Government's failure to bring him to trial within the time limited specified by statute.

However, in examining the facts of the case, as the Government points out in its Response:

> Dismissal with prejudice under Title 18, United States Code, Section 3162(a)(2) is absolutely inapplicable. Assuming arguendo their [sic] was a violation of the Act, the factors of seriousness of the offense, facts leading to dismissal and impact of re-prosecution on the administration of justice militate against such an order. Most importantly, their [sic] exists no prejudice respecting the defendant from any delay. The previous argument that prejudice resulted from witnesses who were made unavailable has been resolved through government stipulation to their testimony . . . . As with nearly every government prosecution, this case has not gotten better with time; it has only gotten older and memories have weakened. This is prejudice to the government—not the defendant.

In point two of his argument, the defendant contends that he has been denied the right to the effective assistance of conflict-free counsel. From this Court's perspective, the defendant is absolutely correct, and had this situation continued through trial and the defendant been convicted, he would most likely be able to remedy the conviction on Petition for Writ of Habeas Corpus.

In such a case, the law is clear and unchallenged. In *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir.), *reh'ng denied* 591 F.2d 102 (5th Cir.), *cert. denied* 444 U.S. 833 (1979), the Fifth Circuit said:

> If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Thus, it has long been held that prejudice need not be shown where an actual conflict of interest is demonstrated by the defendant. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *United States v. Alvarez*, 696 F.2d 1307 (11th Cir.), *cert. denied* ____ U.S. ____ 103 S.Ct. 1878 (1983). Although a conflict may cause a defendant's attorney's performance to fall below Sixth Amendment standards, not all conflicts are so egregious as to rise to a Sixth Amendment violation. *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983). Most recently, courts have firmly ruled that actual, not speculative, conflict must be shown by the presentation of particularized instances of conflicting interests and such must be established as a constitutional predicate before the federal courts will entertain consideration of this claim of ineffective assistance of counsel. *United States v. Ard*, 731 F.2d 718 (11th Cir. 1984); *Barham v. United States*, 724 F.2d 1529 (11th Cir.), *cert. denied* ____ U.S. ____, 104 S.Ct. 2687 (1984).

As the Government sets forth in its Response:

> Invasion of the attorney-client relationship does not mandate dismissal of an indictment. *United States v. Morrison*, 449 US 361, 101 S.Ct. 665 (1981); *Weathford v. Bursey*, [sic] 429 US 545, 97 S.Ct. 837 (1977); *United States v. Melvin*, 650 F.2d 641 (5th Cir. 1981). The remedy must depend upon the impact in the criminal proceeding. Where, as herein, no evidence is to be used in the prosecution and no information is relayed to the prosecuting authority, there is nothing to remedy. In light of *Morrison*, where it was held the drastic remedies of dismissal or suppression would not apply absent a showing of prejudice, the *Melvin* court fashioned the guidelines used herein. The defendant must show how his representation or defense was prejudiced. *Melvin* at 644. Then, only if prejudice is shown, should the court determine what remedy short of dismissal may vindicate the defendant's Sixth Amendment rights to counsel and a fair trial. This is balanced with the public's interest in seeing the guilty brought to justice. *Ibid.* . . .
>
> Regardless of what occurred during Glass' participation as co-counsel, each decision was sanctioned not only by the defendant himself but also co-counsel, Mel Black (see T26 and T31, where defendant was present for conversations with Hursey). The only pleading filed by Glass, a motion to continue for July 25,

1983, indicates he was retained on March 29, 1983. All other motions and pleadings were filed by co-counsel, Black. The true nature of Ofshe's representation by attorneys Black and Glass as it respects the waiver of his speedy trial rights or continuances is unknown in that Black and Ofshe have maintained their attorney-client privilege (See T132-134, 141-142).

Attorney Mel Black has been appearing, without interruption, for defendant Ofshe, since day one of this prosecution. Attorney Black was sole counsel of record until July, 1983. Attorney Black has been sole counsel of record subsequent to April, 1984.

The testimony of attorney Black attempted to place a barrier between case preparation on his part and case negotiation by Glass. This division of authority, as recognized by Mr. Black, did not prevent him from acting in the defendant's best interests in filing motions to continue the case (T138, 140). Whatever the private arrangement was as to who made the decisions, it was clear that the defendant, as well as attorney Black, was consulted (T31). . . .

The defendant next argues that by monitoring Mr. Glass' conversations with the defendant, the defendant's expectation of privacy was violated to such a degree as to justify dismissal of the case. The defendant contends that

[t]here is an enhanced privacy interest underling the attorney/client relationship which warrants a heightened degree of judicial protection and supervision when attorney/client conversations are the subject of electronic surveillance. In the instant case the electronic surveillance was conducted at the whim and fancy of the agents without benefit of court order, judicial supervision or protection. . . .

In the instant case the prosecution intentionally overhead the conversations about the pending case which the defendant had every right to believe were privileged. The government deliberately invaded Ofshe's privileged relationship with his attorney, infiltrated the defense by planting an informant and intercepted communications between an attorney and his client.

The conduct of the government has prejudiced the Defendant by the very destruction of his relationship with this attorney. The government action turned tradition on its head and made it impossible for Ronald Ofshe to ever rely upon the secrecy of his attorney communication or the loyalty of his counsel. If the governmental invasion and subversion of the attorney/client relationship which occurred in this case is sanctioned, there will be a chilling effect on the Sixth Amendment.

Even if the defendant's assertions are true, the relief available to the defendant would be suppression of the statements the defendant made to Mr. Glass. *United States v. Morrison*, 449 U.S. 361 (1981); *United States v. Sander*, 615 F.2d 215 (5th Cir. 1980). In addition, as the Government has stated, it does not intend to use any of these statements. See, *United States v. Sander, id.*

Clearly the Government's actions were ill-advised, but they do not appear to have been deliberate attempts to infringe on or destroy the defendant's attorney-client relationship with Mr. Glass. The Government attempted to avoid any breaches of the attorney-client privilege by issuing instructions and guidelines to Mr. Glass before the consensual monitoring of Mr. Glass' conversation with the defendant. Apparently the Government overestimated Mr. Glass' ability to take instructions and/or underestimated the extent to which Mr. Glass would go to diminish his criminal responsibility in the eyes of the Government. Regardless of how this situation is viewed, the defendant has not suffered any actual articulable prejudice so great as to violate his due process rights nor were the Government's acts so heinous as to warrant dismissal. Without a doubt, the Government was anxious to obtain information from a putative defendant (Mr. Glass) who appeared to have valuable information to give and, with a shining example of tunnel-vision, bumbled ahead without thinking through to the possible consequences should Mr. Glass not follow their instructions. But, as the Government presents in its Response:

> Grabbing at straws, the defendant states the "government has prejudiced the defendant by the very destruction of his relationship with his attorney." This is a reversion to the *per se* dismissal argument rejected by the Supreme Court in *Morrison* and this circuit in *United States v. Melvin*, 650 F.2d 641 (5th Cir. 1981). The argument also ignores the fact that the pre-existing attorney-client relationship with Mel Black has continued to this date. The record is clear that Black has remained conflict-free and vigorously defended the defendant.

The defendant's allegations concerning waiver of forfeiture proceedings and change in precedents relating to search and seizure are without merit. The forfeiture issue is not relevant to this case and a change in precedents is speculative and fails to set forth sufficient reasons to support dismissal.

In fact, these last two arguments are but minor complaints in the defendant's litany of alleged abuses which, together, he concludes amounts to Government misconduct so outrageous as to violate his due process rights.

The defendant is absolutely accurate when he states:

> As noted in a decision of the Eleventh Circuit, Government involvement in criminal schemes can be so outrageous that it offends due process. *See U.S. v. Tobias*, 662 F.2d 381 (5th Cir. 1981) (Unit B), *cert. denied*, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982); *see also Hampton v. U.S.*, 425 U.S. 484, 492-93.

> Furthermore, "[s]erious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment . . . without regard to prejudice of the accused." *United States v. McCord*, 509 F.2d 334 (D.C. Cir. 1974). See also *United States v. Crow Dog*, 532 F.2d 1182 (8th Cir. 1976).
>
> The granting of a dismissal for Government misconduct is designed to maintain public confidence in the administration of justice. *United States v. Taylor*, 648 F.2d 565 (9th Cir. 1981). "The dismissal of an Indictment because of deliberate Government misconduct is used as a prophylactic tool for discouraging future actions of the same nature. *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960) . . ." *United States v. Houghton*, 554 F.2d 1219 (1st Cir. 1977).

A careful examination of the facts in this case, taken singly and as a whole, offends this Court. The Government's actions affront the dignity of the law and the high purpose of law enforcement. What the Government did and the method used to fulfill their purpose, was at times half-baked, certainly not well-planned, clearly improperly supervised and undoubtedly ill-omened. Mr. Glass' actions were deceptive, unctuous but, for him, expedient.

However, even under the harshest light, the Government's actions do not so prejudice the defendant or "shock the conscience" of the Court as to warrant

dismissal of the case. *United States v. Russell, supra; United States v. Mulherin*, 710 F.2d 731 (11th Cir. 1983); *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir. 1983); *United States v. Savage*, 701 F.2d 867 (11th Cir. 1983); *United States v. Capo*, 693 F.2d 1330 (11th Cir. 1982); *United States v. Gianni*, 678 F.2d 956 (11th Cir. 1982); *United States v. Nicoll*, 664 F.2d 1308 (5th Cir.), *cert. denied* 457 U.S. 1118 (1982); *United States v. Tobias*, 662 F.2d 381 (5th Cir.), *cert. denied* 457 U.S. 1108 (1982); *United States v. Ryan*, 548 F.2d 782 (9th Cir.), *cert. denied* 429 U.S. 939 (1976).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 20 day of November, 1985.

/s/ PATRICIA JEAN KYLE
UNITED STATES MAGISTRATE
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